ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

John Hayes, III, Circuit Court Judge

Case No. 2013-001062

James H. Bailey, Jr.

Respondent,

v.

Development Systems International, LLC, David W. Auterson, John R. Curtis, Dianne N. LaRose, James P. LaRose, Robert C. MacConnell, and Sandra M. Morckel, Defendants,

Of Whom David Auterson, John R. Curtis, Dianne N. LaRose, James P. LaRose, Robert C. MacConnell, and Sandra M. Morckel are the Appellants.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On September 9, 2011 John Bailey brought this action against Development Systems International, LLC, its Corporate CEO, James P. LaRose, and its members, John R. Curtis, David W. Auterson, Dianne N. LaRose, Robert C. MacConnell and Sandra M. Morckel. The action alleged breach of contract, breach of contract accompanied by fraud, breach of fiduciary duty, fraud/misrepresentation, negligent/misrepresentation, civil conspiracy, relief pursuant to S.C. Code Ann. §33-44-801, et seq., and wrongful termination of employment.

Development Systems International, LLC was the only Defendant to file an Answer. The court entered a default against the other Defendants on January 9, 2012. They filed a Motion pursuant to Rule 60 (b) of SCRCP to set aside the default against them. The Court denied their Motion, held a *damage hearing* and issued an award of damages to John Bailey in the amount of ($520,017.45) Five Hundred Twenty Thousand Seventeen & 45/100 against James P. LaRose, John R. Curtis, David W. Auterson, Robert C. MacConnell and Sandra M. Morckel. Diane LaRose was not included in the Judgment due to the fact she had a pending action in Bankruptcy Court.

On May 9, 2013, the Defendants served a *notice* of this Appeal.

FACTS

Plaintiff **(hereinafter referred to as the Respondent)** and Defendants, David Auterson, John R. Curtis, James P. LaRose, Robert C. MacConnell and Sandra M. Morckel **(hereinafter referred to as Appellants)** entered into an agreement where each person who worked would be compensated as follows: part-time, Three Thousand ($3,000.00) Dollars per month and full-time, Four Thousand ($4,000.00) Dollars per month. (R. p. 36, ¶ 15). Respondent worked part-time from October 2010 until January 4, 2011, reflected by an operating agreement signed by the parties for Development System International, LLC, (**hereinafter referred to as DSI**,) a South Carolina Limited Liability Company. (R. p. 37, ¶ 20; R. pp. 51-71). The parties' new operating agreement provided for a new system of compensation whereby members of DSI would share in the profits of the company based upon their percentage of ownership. (R. p. 37, ¶ 24). In February 2011, the Respondent was working full-time as an active partner in DSI. In March 2011, the members of DSI executed an Employment Agreement that named James P. LaRose as the CEO of DSI and made him responsible for the oversight of DSI. (R. pp. 70-79). The agreement did not specify salaries for employment with DSI but scheduled financial distributions of funds among members within DSI. The Respondent's employment with DSI was terminated in May 12, 2011 by its CEO, James P. LaRose, (.R. pp. 30, ¶ 2 9). Respondent maintained his interest in DSI. (R. p. 98, lines 1-23).

ARGUMENTS

1. BECAUSE SPECIAL DAMAGE AWARDS, FOR THINGS LIKE LOSS PROFITS, MUST BE BASED UPON SOME DEGREE OF CERTAINTY AND NOT SPECULATIVE, THE JUDGE ERRED IN NOT REQUIRING THE RESPONDENT TO PRESENT EVIDENCE OF A CERTAIN STANDARD OR FIXED METHOD BY WHICH THE LOSS MAY BE ESTIMATED WITH A FAIR DEGREE OF ACCURACY.

The trial judge, in this case of default and unliquated damages, issued a judgment award against the Appellants in the amount of Five Hundred Twenty Thousand Seventeen and 45/100 Dollars ($520,017.45). (R. p. 11). "The power to set aside a default judgment is addressed to the sound discretion of the trial court and will not be disturbed on appeal absent a clear showing of an abuse of discretion" Melton v. Olenik, 379 S.C. 45, 50, 664 S.E.2d 487, 489-90 (Ct. App. 2008). "An abuse of discretion arises when the court issuing the order was controlled by an error of law or when the order, based upon factual conclusions, is without evidentiary support." Id. at 50, 664 S.E.2d at 490.

The order in this case is clearly without evidentiary support. Respondent's claims for damages centered on breach of contact and his termination as an employee of DSI. (Complaint; pp. 11 – 39) The Court awarded damages to the Respondent for salary and commissions in the amount of Three Hundred Ninety Five Thousand ($ 395,000.00) Dollars. (R. p. 10). The purpose of awarding damages for breach of contract is to place the Plaintiff in as good of a position as he would have been if the contract had been performed, South Carolina Federal Savings Bank v. Thornton-Crosby Development Co., 303 S.C. 74, 393 SE. 2d, (Ct. App. 1990).

The Respondent claims that part of his damages in this case were loss wages, salaries, and commissions. (R. pp. 13-15, line 1).

The proper measure of compensation is the loss actually incurred because of the breach. Minter v. GOCT, Inc., 322 S.C. 525, 473 S.E. 2d 63 (Ct. App. 1996). Respondent presented no evidence of any actual losses to the Court. (R. p. 90, line 16 p. 96, line 8). Special or consequential damages, like loss profits, may be recoverable but such damages cannot be based wholly on speculation and conjecture. South Carolina Finance Corp. v. Westside Finance Company, 236 S.C. 109, 113 SE. 2d 329 (1910). In this case, the Judge accepted the Respondent's oral assertions as to what his loss profits and commissions were. The Respondent presented no evidence as to how he arrived at these assertions. (R. pp. 90, line 16-p. 96, line 8). No evidence was presented as to what his base salary was, how he was paid, how his commissions were to be calculated, or any formula as to how he arrived at his lost wages.

The law is clear. There must be "a certain standard or fixed method by which the loss may be estimated with a fair degree of accuracy". See Thornton at page 8. The record is completely void of any such evidence in this case. (R. p. 90, line 16, p. 96, line 8). The Judge opined that the Respondent was also entitled to damages for a cost of living loan and awarded him One Hundred Twenty Thousand ($120,000.00) Dollars for loans that he made for living expenses. (R. p. 10). Again, the Judge relied on oral assertions and no other proof. The Judge abused his discretion by relying solely on Plaintiff's vague testimony and not requiring documentation supporting the Respondent's calculations.

2. BECAUSE THE PARTIES WERE NOT SUED JOINTLY AND SEVERALLY, THE JUDGE ERRED BY ASSESSING ALL THE DAMAGES TO THE APPELLANTS AND NOT DETERMING THE COMPANY'S LIABILITY AND RESPONSIBILITY FOR DAMAGES OR APPORTIONING DAMAGES AMONG THE APPELLANTS.

The Appellants were all Defaulting Defendants in this case. All, but one of them, are members of the non defaulting limited liability company, DSI.R. R. pp.2 – 4). The Respondent's case against DSI is still pending. The parties, according to the complaint, were not sued jointly and severally. The trial judge did not require the Respondent to differentiate the damages of the Appellants from the non defaulting DSI. The Respondent testified that the conduct of the Defendants, as alleged in the complaint, caused him to sustain damages. (R. pp. 119, line___ p. 120, line 6). The Defendants, as alleged in the complaint, includes both DSI and the Appellants. The Respondent declined to testify on this issue and specifically deferred to the judge. (R. p. 119, lines 9 – 24). The ruling of the judge assessed all the damages the Respondent claimed against the Appellants. (R. p. 10) . The consequence of the Judge's ruling was to make the pending trial of Respondent against DSI, meaningless because the Appellants now bear the full responsibility of all the damages claimed by the Respondent.

Additionally, the trial judge did not differentiate damages among the Appellants as required by S.C. Code Ann § 15-38-15 (1976). The damage award of the Judge makes all of the Appellants individually or mutually responsible to the Respondent for payment. A default, as to liability, does not make the Appellants jointly and severally liable for damages. The trial Judge also erred by not assessing the appropriate damages to each Appellant. The court should have determined the damages and responsibility of each Appellant. One of the defaulting Defendants was left out of the award of damages due to bankruptcy. (R. p. 2, p. 10).

3. **BECAUSE THE OPERATING AGREEMENT CONTROLS THE DEALINGS BETWEEN THE PARTIES, THE JUDGE ERRED BY NOT USING THE AFORESAID AGREEMENT AS A BASES FOR AWARDING ANY UNLIQUATED DAMAGES.**

The dealings of members of a limited liability company are controlled by the parties' operating agreement. S.C. Code Ann § 33-44-103 (1976). In this case, the parties operating agreement provided as follows:

> **5.9: Liability to Company**: A member shall not be liable or accountable in damages or otherwise to the Company or to the other member for any error of judgment or any mistake of fact or law or for anything that such Members may do or refrain from doing hereafter, in their capacity as a member, for and on behalf of the Company and in furtherance of its interest, except in the case of their willful misconduct or their bad faith in performing or failing to perform their duties hereunder.
>
> **5.10: Indemnity**: The Company and the Members do hereby indemnify and agree to hold each Member wholly harmless from and against any loss, expense, or damage (including reasonable attorney's fees) incurred by it by reason of anything with such Member may do or refrain from doing hereafter, in his capacity as a Member, for and on behalf of the Company and in furtherance of its interest; provided, however, that the Company and the Members shall not be required to indemnify any Member for any loss, expense or damage which he may suffer as a result of his willful breach of this Operating Agreement, his willful misconduct, gross negligence, or bad faith in performing or failing to perform his duties hereunder. (R. p. 34, 50, p. 62).

These sections of the parties operating agreement make it clear that the Respondent contracted away any damages or claims he would have against the Appellants and his fellow members of DSI. The whole idea of forming a limited liability company as opposed to another type of entity is the members' ability to limit their personal liability. The members who enter into such an agreement contemplate this as a part of the protections that the limited liability company offers. The Judge erred by not giving deference to the contractual relationship of the parties. The Judge disregarded the parties operating agreement and assessed damages.

4. BECAUSE, IN UNLIQUATED DAMAGES CASES, THE DEFENDANTS, EVEN THOUGH IN DEFAULT AS TO LIABILITY, HAVE A RIGHT TO EXPECT THE JUDGMENT OF THE COURT TO BE IN KEEPING WITH THE ALLEGATIONS OF THE COMPLAINT, PRAYER FOR RELIEF AND PROOF SUBMITTED, THE JUDGE ERRED BY USING ONLY THE RESPONDENT'S ORAL ASSERTIONS TO, DETERMINE THE AMOUNT OF HIS DAMAGES.

The Judge failed to consider the Complaint and the Exhibits attached thereto when he awarded damages in this case. The law requires the Judge to consider the Complaint when he awards damages in default situations. W.T. Lewis v. Congr. of Racial Equality and/or C.O.R.E. 275, S.C. 556, 274 SE.2d, 287 (S.C. 1981). In Lewis, the Court recognized and noted the problem of the proper assessment of damages arising out of default-unliquated damages situations. **See also**, Howard v. Holiday Inns, Inc., 271 S.C. 238, 246 S.E.2d 880 (1978); Petty v. Weyerhaeuser Co., 272 S.C. 282, 251 S.E.2d 735 (1979); Southland Mobile Homes v. Assoc. Fin. Serv., 274 S.C. 488, 265 S.E.2d 258 (1980) ; Renney v. Dobbs House, Inc., 275 S.C. 562, 274 S.E.2d 290(1981); Rochester v. Holiday Magic, Inc., 253 S.C. 147, 169 S.E.2d 387 (1969); The Lewis Court was considering a case in a series of cases that was giving the court a great deal of concern that involved large damage awards in default claims involving unliquated damages. That Court went on to issue a reminder that the courts should closely scrutinize default judgments to prevent harsh results and drastic action. The Judge's inaction created the same type situation that these courts were trying to avoid.

The Complaint is silent with regard to damages. (R. pp. 34 – 50). The operating agreement does not allow for damages between the members of DSI. (R. pp. 34 -50, p. 62). The agreement that allowed compensation for members working for DSI was replaced by the Employment Agreement dated Mach 2011. (R. pp. 34 – 50, pp. 76 – 79, p. 103, line 1 – p. 104, line 19).

That agreement had no provision for the payment of compensation to any eligible member who worked for DSI.

Even if the court had used the prior agreement as a basis for damages, Respondent's damages would have been substantially less than the amount awarded by the Court in this case. There is no evidence showing whether the Respondent was including, in his calculations, commissions. If he were, there was no evidence or testimony presented as to the specific amounts of these commissions, methods of compensation or circumstances under which they were to be paid. In Holiday Inn, Supra, the court was clear that a default on liability is not a default on damages and the burden was on the Plaintiff to prove his damages. The Respondent simply threw out a few numbers and the court relied on that testimony, alone, in awarding damages. The body of cases herein above mentioned suggested that the Judge erred in awarding damages based upon the vague assertions by the Respondent with no other supporting evidence and this conduct is an abuse of his discretion.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

Respectfully submitted,

December _____, 2013

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CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

Respectfully submitted,

December 19, 2013

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Appellants.

PROOF OF SERVICE

I certify that I have served three copies of the Appellant's Final Brief and Final Reply Brief on James H. Bailey, Jr. by depositing copies in the United States Mail, postage prepaid on December 19, 2013, addressed to his attorney of record, Audra M. Byrd, Post Office Box 2116, Myrtle Beach, South Carolina 29578.

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